No. 87-441

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

# In The Supreme Court Of The United States

October Term, 1987

MARY SCOTT BLAKE BIRDSALL, MAGRUDER DENT, JR., and ROBERT PLAYFORD BOYLE, Executors of the Estate of Evernghim Blake, Appellants,

v.

THOMAS R. SHEPHERD, JR. and R.J. CONNORS, Executors of the Estate of Kathleen Ann Kelley Blake and Trustees of the Kathleen Ann Kelley Blake Living Trust, and Personally, KATHLEEN SHEPHERD MacMILLAN, CHRISTOPHER H. SHEPHERD, MICHAEL K. SHEPHERD, MARY SHEPHERD COLEMAN, and ANN SHEPHERD LUGAR, Appellees.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

## JURISDICTIONAL STATEMENT

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September 14, 1987

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## QUESTION PRESENTED

Should a decedent's estate be responsible for Virginia and Maryland estate tax on the property of others included in the decedent's estate for federal tax reporting purposes when federal law explicitly relieves the decedent's estate of all federal tax liability on the property and when the decedent's beneficiaries have no interest in the property?

TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | 1 |
| Table of Authorities | 3 |
| Opinions Below | 4 |
| Jurisdiction | 5 |
| Constitutional Provisions and Statutes | 7 |
| Statement of the Case | 9 |
| Statement of Reasons Why Questions Presented are Substantial | 18 |
| Conclusion | 33 |
| Certificate | 34 |
| Appendix | 1a |

TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| Free v. Bland, 369 U.S. 663 (1962) | 31 |
| Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) | 31 |
| Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968) | 32 |
| Thompson v. Consolidated Gas, 300 U.S. 55, 80 (1937) | 33 |
| U.S. v. Yazell, 382 U.S. 341, 352 (1966) | 31 |

## OPINIONS BELOW

The opinion of the Supreme Court of Virginia dated June 16, 1987, which appears in the Appendix hereto, p. 1a, infra., is not a reported opinion.

The letter opinion of the Circuit Court of Albemarle County, Virginia, dated May 12, 1986, which appears in the Appendix hereto, p. 2a, infra., is not a reported opinion.

The final Order in the Circuit Court of Albemarle County, Virginia, entered on June 12, 1986, which appears in the Appendix hereto, p. 5a, infra., is not a reported opinion.

## JURISDICTION

The judgment of the Supreme Court of Virginia dated June 16, 1987, affirming the final Order of the Circuit Court of Albemarle County, Virginia, which upheld the constitutionality of Virginia Code § 64.1-161 which, prior to July 1, 1986, required that the Virginia estate tax be apportioned on a prorata rather than an incremental basis with respect to QTIP trust assets and further that, with respect to the apportionment of Maryland's estate tax, the beneficiaries of the QTIP assets were not responsible for the increased tax occasioned thereby. The effect of said holdings is to apply to Appellants Virginia and Maryland apportionment statutes which are void under federal law as to their circumstances.

A Notice of Appeal to this Court was timely filed in the Supreme Court of Virginia on September 4, 1987.

This appeal is being docketed in this Court within ninety days from the date of the opinion of the Supreme Court of Virginia.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2).

## CONSTITUTIONAL PROVISONS AND STATUTES

Constitution of the United States:

Amendment 5.

Amendment 14. Section 1.

Article VI. Clause 2.

Code of Virginia:

Sec. 58.1-901 (1984).

Sec. 58.1-902.

Sec. 58.1-905.

Sec. 64.1-161 (1950).

Sec. 64.1-162.

Annotated Code of Maryland:

Art. 62A, § 2 (1957).

Art. 81, § 151 (1957).

§ 11-109 (1974).

Internal Revenue Code:

Sec. 2011.

Sec. 2044.

Sec. 2056.

Sec. 2207A.

Sec. 2523.

## STATEMENT OF THE CASE

Evernghim Blake, a resident of Albemarle County, Virginia, died on June 20, 1984. He was survived by three children by previous marriage who are his beneficiaries. His wife, Kathleen Ann Kelley Blake, also a Virginia resident, predeceased Mr. Blake on November 19, 1983. Mrs. Blake's will provided that after payment of expenses, taxes and certain specific bequests, the balance of her estate was to "pour over" to the Kathleen Blake Trust. Mr. Blake was the income beneficiary of this trust during his lifetime; at his death, the entire trust principal and accumulated undistributed income were to be distributed to Mrs. Blake's six children by previous marriage.

Mrs. Blake's executors elected to qualify $11,805,791.00, or 88.19%, of the

assets of the Kathleen Blake Trust as Qualified Terminable Interest Property ("QTIP") under § 2056(b)(7) of the Internal Revenue Code. As a consequence of making that election, this property, which included no property in Maryland, was not taxed for federal or state estate tax purposes at the time of Mrs. Blake's death. However, QTIP property had to be included in Mr. Blake's estate for federal estate tax reporting purposes when he died. Because Virginia and Maryland use the federal estate tax return for reporting purposes and take only their shares of the federal credit allowed them, the QTIP was also included in Mr. Blake's estate for state tax purposes.

At the time of his death Mr. Blake had a federal taxable estate, excluding the QTIP, of $4,158,778.00, over 60% of

which consisted of non-liquid assets: a farm and related real and tangible property located in Virginia, and a farm in Maryland. Including the QTIP, Mr. Blake's reported estate increased to $15,964,569.00, an increase of $11,805,791.00. His net federal estate tax was consequently increased from $1,534,445.00 to $6,303,882.00 because of the QTIP. Virginia's and Maryland's estate taxes are equal to a graduated percentage of the federal tax. Mr. Blake's Virginia estate tax liability was $1,968,784.00, of which $1,695,429.00 was the increase attributable to the QTIP. Finally, Maryland also claims an increase in tax because of the QTIP totaling $28,319.00.

Mr. Blake's executors demanded reimbursement from Mrs. Blake's estate of the full incremental amount of the

increases in his estate taxes due to the QTIP pursuant to § 2207A of the Internal Revenue Code. Mrs. Blake's executors-trustees have reimbursed Mr. Blake's estate for the full incremental increase of the federal tax. However, relying on the Virginia apportionment statute, they have only reimbursed Mr. Blake's estate for a proportionate amount of the Virginia taxes, leaving a shortfall of $358,034.00. They have not paid any of the increase in the Maryland estate tax at all. These are the amounts in controversy in this case.

In the Circuit Court of Albemarle County, the Court of first instance, Plaintiffs'/Appellants' Trial Memorandum, on page 14, stated that "federal apportionment statutes preempt conflicting state apportionment statutes". In Plaintiffs'/Appellants'

Memorandum in Support of Bill for Declaratory Judgment and Further Relief, Appellants, on page 12 thereof, stated specifically that "two important constitutional problems are raised if the Virginia and Maryland statutes are interpreted so as to charge Mr. Blake's heirs with a portion of the tax on property in which they have no interest. The Supremacy Clause of Article VI of the Federal Constitution states that when a state law comes in conflict with the federal law or policy, the state law must yield." And, on page 13, Appellants stated "moreover, taxing one person on the property that belongs to another person is a taking of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution". . . . And, on page 15 thereof, Appellants stated that "if the

law is read to force Mr. Blake's heirs to pay any part of the tax on the QTIP on behalf of Mrs. Blake's heirs, it is, in effect, a taking of the private property of one person for the private use of another . . . Such a taking violates the due process clauses of the Fifth and Fourteenth Amendments". The questions here sought to be reviewed were thus raised in the Court of first instance and argued extensively in said Memoranda and orally, but said Court ruled, in its letter opinion of May 12, 1986, that it was "of the opinion that there is no Constituional infirmity in the apportionment of the Virginia tax on a prorata basis between those who receive the assets that were included in Mr. Blake's taxable estate". Further, in said letter opinion the Court ruled that "as for the Maryland tax liability, Mr.

Blake's will in its paragraph FOURTH directs the payment of that tax. The asset located in Maryland was solely owned by Mr. Blake at the time of his death".

The same questions sought here to be reviewed were raised again in Plaintiffs'/Appellants' Petition for Appeal to the Supreme Court of Virginia by stating on page 21 thereof that "two important Constitutional problems are raised if the Virginia and Maryland statutes are interpreted so as to charge Mr. Blake's heirs with a portion of the tax on property in which they have no interest. The Supremacy Clause of Article VI of the Federal Constitution states that when a state law comes into conflict with a federal law or policy, the state law must yield . . . Moreover, taxing one person on property

that belongs to another person is a taking of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution . . . ." On page 25 of said Petition Plaintiffs/Appellants stated that the Supreme Court has said that "one person's property may not be taken for the benefit of another private person without a justifying public purpose. . . If Mr. Blake's heirs are forced to pay part of the tax on the QTIP on behalf of Mrs. Blake's heirs, there will be such a taking. This violates the due process clauses of the Fifth and Fourteenth Amendments." Again, these questions were argued extensively in said Petition for Appeal and orally before three justices of said Court as Plaintiffs/Appellants sought a writ of error. The Supreme Court of Virginia, however, refused the

Petition for Appeal and found no reversible error in the judgment of the lower Court.

## STATEMENT OF REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

In 1981, the United States Congress passed the Economic Recovery Tax Act (ERTA). This Act changed the federal tax treatment of certain property passing between spouses. The old law had allowed a decedent to pass the greater of $250,000.00 or 50% of his adjusted gross estate to his spouse and to deduct that amount from his estate. This "marital deduction" was subject to the limitation that the surviving spouse had to have control over the ultimate disposition of the property transferred. Former I.R.C. § 2056(c).

In order to permit both spouses to enjoy property within the marital unit without tax, ERTA changed the federal estate tax marital deduction rules to allow a deduction for <u>all</u> property

passing to the surviving spouse. The Code also allows a deduction if the first-dying spouse creates a life estate in her spouse with remaindermen designated. Such property is designated Qualified Terminable Interest Property ("QTIP"). I.R.C. § 2056(b)(7). To qualify as a QTIP, the surviving spouse can have no right to transfer the QTIP at his death, such power being reserved to the first-dying spouse. If the first-dying spouse creates by will or other instrument a trust that otherwise qualifies as a QTIP, her executors may elect QTIP treatment and deduct all or any part of the corpus of the trust from the first decedent's taxable estate.

QTIP property must be included in the taxable estate of the second-dying spouse and is then taxed. I.R.C. § 2044. Notwithstanding this collective reporting

mechanism, the second-dying spouse has no power to transfer QTIP property to his distributees. In order that the burden of the taxes on the property fall where the benefit of the property lies, the Code entitles the second-dying spouse's estate to recover the full incremental increase of the federal estate taxes (the amount by which the total taxes due exceed the tax which would have been payable had the QTIP property not been included in the gross estate) from the beneficiaries of the QTIP property. I.R.C. § 2207A.

In this case, the appellees, executors of the estate of Mrs. Blake, elected to designate $11,805,791.00 of her trust as a QTIP. This amount was consequently included in Mr. Blake's estate when he died, increasing his taxable estate from $4,158,778.00 to

$15,964,569.00. Pursuant to § 2207A, Mrs. Blake's estate has reimbursed Mr. Blake's estate for the entire increase in federal estate taxes due by reason of the inclusion of the QTIP in his estate: $4,769,437.00. The appellees, however, under Virginia's estate tax apportionment statute, Virginia Code § 64.1-161A (1950), have paid only their proportionate part of the Virginia estate tax due as a result of the inclusion of the QTIP. Since QTIP represents 68% of Mr. Blake's estate, they have paid 68% of the Virginia estate tax due on Mr. Blake's gross estate. The Supreme Court of Virginia has, in this case, interpreted Virginia's apportionment statutes §§ 64.1-161A and 64.1-162 and determined that a proportionate and not an incremental payment is required and appellees conduct is consistent

therewith. Appellees claim no responsibility for the increase of $28,319.00 of Maryland tax occasioned by the inclusion of the QTIP proceeds. The Court of first instance held that since the Maryland property was solely owned by Mr. Blake at his death and paragraph FOURTH of his will directed that "Taxes imposed on my estate by reason of my death . . . are to be paid from the residue of my estate", appellees had no liability for the increase in Maryland's estate tax as a result of the inclusion of QTIP proceeds.

Key statutory sections at issue in this litigation are §§ 64.1-161A and 64.1-162 of the Code of Virginia (1980). These sections comprise Virginia's "apportionment statute". While § 58.1-900, et seq., of the Code of Virginia (1984) determines the amount of estate

tax due the state, §§ 64.1-161A and 64.1-162 determine how that tax should be divided among beneficiaries. Apportionment statutes have been passed in more than half the states (Maryland has one, Maryland Estates and Trusts Code Ann. § 11-109 (1974), that is similar in operation to Virginia's.). These statutes charge each beneficiary of an estate with a share of the estate tax proportionate to his interest.

The Virginia apportionment statute relied upon by the appellees was enacted prior to the enactment by Congress of the QTIP provisions. Sections 64.1-161A and 64.1-162 of the Code of Virginia were both included in the 1950 Code, and last amended in 1979 and 1968, respectively. The method used to determine fair share is simple: the total tax is allocated prorata by reference to the ratio which

the value of the property a beneficiary receives (inherits) from an estate bears to the total value of the estate property.

This statutory approach made perfect sense until the QTIP provisions were enacted, because there was only ever one estate involved. Under QTIP, however, there will always be two estates which are being reported together. The question becomes not how to apportion tax among beneficiaries, but how to divide it between estates. The burden of estate tax should be apportioned, but only among the parties who inherit the property being taxed.

In its 1986 session, the Virginia Legislature amended § 64.1-161 and, in so doing, left no doubt that the Virginia rule is now the same as federal rule. New § 64.1-161B provides that, in the

case of property included in a decedent's estate because of I.R.C. § 2044, the amount of tax due from the estate shall be:

> the excess of (i) the total estate tax levied or assessed under the provisions of the estate tax laws of the Commonwealth of Virginia and the United States over (ii) the estate tax that would have been levied or assessed under those provisions if the § 2044 property had not been included in the gross estate.

The amendment further provides that the tax on QTIP property "shall be prorated only among the persons interested in the estate to whom such property accrues." This amendment by its terms however applies only to estates of decedents dying on or after July 1, 1986.

The appellees' approach allows them to avoid paying a tax and then claim to the federal government that they <u>have</u> paid it. The I.R.S.'s Estate Tax Return,

Form 706, includes on line 13 a Credit for State Death Taxes. This amount is a direct credit against the federal tax due. So long as this amount is paid to a state in partial or complete satisfaction of that state's death tax, it does not have to be paid to the federal government. This credit is allowed only for taxes "actually paid to any State..." Treas. Reg. § 20.2011-1 (Emphasis added.); if a state does not have a death tax, the amount of the credit is to be paid the federal government.

If Virginia and Maryland did not impose estate taxes on decedents, Mr. Blake's federal estate tax would have been increased by $2,021,131.00, the amount of the credit on his federal return. All of that amount attributable to the QTIP--$1,723,748.00--would have been the responsibility of Mrs. Blake's

estate. Since Virginia and Maryland do collect estate tax, Mrs. Blake's executors have claimed relief from the federal government of their $1,723,748.00 liability. However, they have not paid $1,723,748.00 to any state. There is a $386,353.00 discrepancy between the amount of the federal credit the appellees have claimed and the amount of state taxes they have actually paid ($1,337,395.00).

Maryland imposes two principal taxes at the death of a resident or non-resident owning property subject to Maryland's taxing power. Maryland Ann. Code art. 81A imposes an inheritance tax on the beneficiaries of Maryland property. Maryland Ann. Code art. 81A, § 151 (1957). Maryland Ann. Code art. 62A provides that insofar as there is a difference between this inheritance tax

and the amount of the federal credit for state death taxes due to Maryland, that difference shall be due to the State of Maryland as an estate tax. Maryland Ann. Code art. 62A, § 2 (1957). The total amount due to the State of Maryland will consequently equal the amount available to Maryland from the federal credit.

Virginia and Maryland prorate the federal credit according to the amount of property the decedent owned in each state. Of the $2,021,131.00 credit available from Mr. Blake's federal tax return, Virginia is entitled to receive $1,968,784.00 and Maryland is entitled to receive $52,347.00. Both of these amounts are inflated because of the inclusion of the QTIP in Mr. Blake's federal estate tax. The same arguments as to why the appellees should not be allowed to shift a portion of the

Virginia tax due because of the QTIP to the appellants apply to why they should not be allowed totally to avoid Maryland tax. Maryland's apportionment statute, Md. Ann. Code § 11-109, (1957), like Virginia's, was enacted before Congress ever created QTIPs, or required that the amount of a first-dying spouse's QTIP property be reported in the estate of the spouse dying second. Appellees claim they are absolved of liability to Maryland simply because the money is due to a different jurisdiction and not the federal government. Such reasoning is inequitable and constitutionally suspect with respect to Maryland taxes just as it is with respect to Virginia taxes.

Appellees contend that the QTIP is not property "the transfer whereof it is within the power of the State of Maryland, to suject to the 'Maryland

estate tax'". Maryland Ann. Code art. 62A, § 1(f) (1957). Therefore it is not part of Mr. Blake's "Maryland Estate" and is not subject to Maryland estate tax and they are consequently not liable for any portion of any Maryland estate tax. This argument elevates form over substance and patently ignores reality. Though no Maryland estate tax is technically being levied on the QTIP, the amount of tax Maryland collected from Mr. Blake's estate has been almost doubled because of the inclusion of QTIP.

Two important Constitutional problems are raised if the Virginia and Maryland statutes are permitted to charge Mr. Blake's heirs with a portion of the tax on the QTIP. The Supremacy Clause of Article VI of the Federal Constitution states that when a state law comes in conflict with a federal law or policy,

the state law must yield. Virginia Code § 64.1-161A and Maryland § 11-109(6)(b) are in direct conflict with clear federal policy. Morever, taxing one person on property that belongs to another person is a taking of property without Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.

The doctrine of preemption states that if a state law does "'major damage' to 'clear and substantial federal interests'...the supremacy clause will demand that state law be overridden". Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979), citing U.S. v. Yazell, 382 U.S. 341, 352 (1966). If the state law clearly conflicts with a federal law or policy, the state law must fall. Free v. Bland, 369 U.S. 663 (1962).

The same rule has been applied by

federal courts sitting in Virginia to strike down state laws in contravention of federal policy. Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968).

Virginia Code § 64.1-161A and Maryland Code § 11-109(6)(b) are clearly unconstitutional and therefore invalid under the Supremacy Clause as to appellants' circumstances. When Congress changed the marital deduction laws in 1981, it clearly expressed a new federal policy regarding marital property.

The appellees' position in this case does major damage to this clear federal scheme. It imposes a tax burden on property Congress had intended to be free of such tax burden by subjecting a surviving spouse's estate to tax on property not a part of his estate.

Finally, the apportionment statutes of Virginia and Maryland create an

unconstitutional taking of property without due process of law. The Supreme Court has said that "one person's property may not be taken for the benefit of another private person without a justifying public purpose." Thompson v. Consolidated Gas, 300 U.S. 55, 80(1937). If Mr. Blake's heirs were forced to pay part of the tax on the QTIP on behalf of Mrs. Blake's heirs, there will be such a taking. This violates the due process clauses of the Fifth and Fourteenth Amendments.

## CONCLUSION

For these reasons, this Court should note probably jurisdiction of this appeal.

Respectfully submitted,

Robert P. Boyle
420 Park Street
Charlottesville, Virginia 22901
Counsel for Appellants

September 4, 1987

C E R T I F I C A T E

I do hereby certify that true and correct copies of the Jurisdictional Statement were mailed to Mary Sue Terry, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia, 23219; Joseph Curran, Jr., Attorney General of Maryland, 7 North Calvert Street, Baltimore, Maryland, 21202; and Lucius H. Bracey, Jr., Esquire, Counsel for Appellees, Court Square Building, P.O. Box 1288, Charlottesville, Virginia, 22902, in accordance with the Rules of the Supreme Court of the United States, this 14th day of September, 1987.

Robert P. Boyle

IN THE SUPREME COURT OF VIRGINIA

on Tuesday, the 16th day of June, 1987.

Record No. 860851
Circuit Court No. 5368-C

MARY SCOTT BLAKE BIRDSALL, et al., etc.,
Appellants,

v.

THOMAS R. SHEPHERD, et al., etc.,
Appellees.

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Birdsall, et als. v. Shepherd, et als.
Chancery 5368-C
Albemarle County Circuit Court
(Letter Opinion dated 12 May 1986)

The primary dispute involved in this proceeding is whether the increased Virginia state tax liability of the Evernghim Blake estate, attributable to the inclusion of "Q-TIP" trust assets in his taxable estate is to be allocated incrementally or proportionately on a prorata basis. I conclude that Virginia Code § 64.1-161, as applied to estates of individuals dying prior to July 1, 1986, requires that the tax be apportioned on a prorata basis. The General Assembly of Virginia during its 1986 session gave recognition of no other interpretation of said statute when it made provision for incremental allocation of Virginia's tax attributable to "Q-TIP" trust assets that are included in the taxable estate of a

person dying on or after July 1, 1986. I am further of the opinion that there is no tax on a prorata basis between those who receive the assets that were included in Mr. Blake's taxable estate.

As for the Maryland tax liability, Mr. Blake's will in its paragraph FOURTH directs the payment of that tax. The asset located in Maryland was solely owned by Mr. Blake at the time of his death.

In summary, the defendants are not liable to the Evernghim Blake estate for any more of the Virginia estate taxes assessed against Mr. Blake's estate than they have already paid. They have no liability as to the Maryland tax.

As for defendants' request that representatives of Mrs. Blake's beneficiaries be permitted to participate

in any audit procedures concerning the value of "Q-TIP" related assets, such request more appropriately is to be addressed to those tax officials who may conduct an audit.

Finally, the presence of the Commonwealth of Virginia was not necessary to the adjudication of the issues presented in this action. Its motion to drop its Tax Commissioner William H. Forst as a party defendant is granted.

Mr. Perkins will draft an order relative to the rulings herein made and will submit it to counsel for endorsement.

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

Re: ESTATE OF KATHLEEN ANN KELLEY BLAKE (DISTRIBUTION OF ASSETS CAUSE)

and

MARY SCOTT BLAKE BIRDSALL, et al.,
Plaintiffs,

v. Chancery No. 5368-C

THOMAS R. SHEPHERD, JR., EXECUTOR, et al.,
Defendants.

**FINAL ORDER**
(Entered 12 June 1986)

On April 4, 1986, all parties appeared, by counsel, to be heard on the issues joined in these combined cases. Evidence was presented to the Court by stipulation and by ore tenus testimony. Oral argument of counsel was heard and the parties submitted memoranda.

After consideration of the issues in light of the evidence and law, the Court, for the reasons stated in letter opinion

dated May 12, 1986, is of the opinion that the defendants are not liable to the Evernghim Blake Estate for any more of the Virginia estate taxes assessed against that Estate than the defendants have already paid; and that the defendants have no liability for payment of any Maryland estate tax of the Evernghim Blake Estate.

The Court is further of the opinion that the presence of the Commonwealth of Virginia was not necessary to the adjudication of the issues presented in this cause; accordingly,

It is hereby ORDERED and DECREED:

That the motion of the defendant, William H. Forst, Tax Commissioner of the Commonwealth of Virginia, be dropped as a party defendant to the Bill of Declaratory Judgment and Further Relief

is granted and this cause of action is dismissed as to that defendant;

That the Bill for Declaratory Judgment and Further Relief be, and is hereby, dismissed as to all other defendants;

That the distribution of assets cause was settled by the parties, excepting Forst, and is therefore dismissed;

That the prayers of all parties for awards of attorney's fees are denied;

Further, being of the opinion it has no jurisdiction so to act, the Court declines to consider the Motion of the defendants, William H. Forst excepted, to participate in any audit procedures initiated by governmental taxing authorities concerning the value of "QTIP" related assets included in the taxable estate of Evernghim H. Blake.

The objections of plaintiffs to the adjudications herein set forth are noted and the objection of defendants, William H. Forst excepted, to the declination of adjudication of attorney's fees is noted.

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

MARY SCOTT BLAKE BIRDSALL,
MAGRUDER DENT, JR, and
ROBERT PLAYFORD BOYLE,
Executors of the Estate of
Evernghim Blake,

Plaintiffs/Appellants

v.

THOMAS R. SHEPHERD and
R.J. CONNORS, Executors of
the Estate of Kathleen Ann
Kelley Blake and Trustees of
the Kathleen Ann Kelley
Blake Living Trust, and
Personally,
KATHLEEN SHEPHERD MacMILLAN,
CHRISTOPHER H. SHEPHERD,
MICHAEL K. SHEPHERD,
MARY SHEPHERD COLEMAN, and
ANN SHEPHERD LUGAR,

Defendants/Appellees

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**NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES**

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Notice is hereby given that Mary Scott Blake Birdsall, Magruder Dent, Jr., and Robert Playford Boyle, Executors of

the Estate of Evernghim Blake, the Appellants above-named, hereby Appeal to the Supreme Court of the United States from the Final Order of the Supreme Court of Virginia upholding the judgment complained of from the Circuit Court of Albemarle County entered in this action on Tuesday, the 16th day of July, 1987.

This Appeal is taken pursuant to United States Code Title 28, Section 1257(2).

Dated: 4 September, 1987

/s/ Robert Playford Boyle
Robert Playford Boyle
Counsel for Plaintiffs/Appellants
420 Park Street
Charlottesville, VA 22901

I, Lucius H. Bracey, Jr., counsel for all the Defendants/Appellees, hereby acknowledge personal service of this Notice of Appeal to the Supreme Court of the United States.

/s/ Lucius H. Bracey, Jr.

LUCIUS H. BRACEY, JR.
McGuire, Woods, Battle & Boothe
Court Square Building
P.O. Box 1288
Charlottesville, VA 22902

I, Robert Playford Boyle, attorney for Mary Scott Birdsall, Magruder Dent, Jr. and Robert P. Boyle, Executors of the Estate of Evernghim Blake, Appellants, and a member of the Bar of the Supreme Court of the United States hereby certify that, on 4 September 1987 I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Thomas R. Shepherd, Jr., 540 Ivy Farm Road, Charlottesville, Virginia, 22901; R.J. Connors, 11 South Meramec Avenue, Suite 11, St. Louis, Missouri, 63105; Kathleen S. MacMillan, 22 Dale Drive, Chatham, New Jersey, 07928; Christopher H. Shepherd, 2009 Westover Hills Boulevard, Richmond, Virginia, 23225; Michael K. Shepherd, HCR 1, Box 81, Charlottesville, Virginia, 22901; Mary S. Coleman, 355 Spring Lane, Charlottesville, Virginia, 22901; and Ann S. Lugar, Route 3, Box 75, Charlottesville, Virginia, 22901, all parties required to be served, by mailing a copy thereof in a duly addressed envelope with first class postage prepaid to each of the aforesaid parties at their stated addresses.

Dated: 4 September 1987

/s/ Robert P. Boyle
Robert P. Boyle
420 Park Street
Charlottesville, VA 22902

Constitution of the United States:

Amendment 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14.
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * * * * *

Article VI. * * * * *
Clause 2. This Constitution, and the Laws of the United States which

shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Code of Virginia:

Sec. 58.1-901 (1984). Definitions.--As used in this chapter, unless the context clearly shows otherwise, the term or phrase: *
"Federal credit" means the maximum amount of the credit for state death taxes allowable by § 2011 of the United States Internal Revenue Code of 1954, as amended or renumbered, or successor provision, in respect to a decedent's taxable estate. The term "maximum amount" shall be construed as to take full advantage of such credit as the laws of the United States may allow. In no event, however, shall such amount be less than the federal credit allowable by § 2011 of the Internal Revenue Code as it existed on January 1, 1978.
"Gross estate" means "gross estate" as defined in § 2031 of the United States Internal Revenue Code of 1954, as amended or renumbered, or the successor provision of the laws of the United States. * * *

Sec. 58.1-902.
A. A tax in the amount of the

federal credit is imposed on the transfer of the taxable estate of every resident, subject, where applicable, to the credit provided for in subsection B.

B. If the real and tangible personal property of a resident is located outside of the Commonwealth and is subject to a death tax imposed by another state for which a credit is allowed under § 2011 of the Internal Revenue Code of 1954, as amended or renumbered, or the successor provision of the laws of the United States relating to federal estate taxes, the amount of tax due under this section shall be credited with the lesser of:

1. The amount of the death tax paid the other state and credited against the federal estate tax; or

2. An amount computed by multiplying the federal credit by a fraction, the numerator of which is the value of that part of the gross estate over which another state or states have jurisdiction to the same extent to which Virginia would exert jurisdiction under this chapter with respect to the residents of such other state or states and the denominator of which is the value of the decedent's gross estate.

C. Property of a resident includes:

1. Real property situated in the Commonwealth of Virginia;

2. Tangible personal property having an actual situs in the Commonwealth of Virginia; and

3. Intangible personal property owned by the resident regardless of where it is located. (Code 1950, § 58-238.3; 1978, c. 838; 1984, c 675.)

Sec. 58.1-905.

A. The personal representative of every estate subject to the tax imposed by this chapter who is required by the laws of the United States to file a federal estate tax return shall file with the Department, on or before the date the federal estate tax return is required to be filed: (i) a return for the tax due under this chapter; and (ii) a copy of the federal estate tax return. * * * * * C. The tax due under this chapter shall be paid by the personal representative to the Department not later than the date when the return covering this tax is required to be filed under subsection A or B. If such tax is paid pursuant to subsection B, interest, at a rate equal to the rate of interest established pursuant to § 58.1-15, shall be added for the period between the date when such tax would have been due had no extension been granted and the date of full payment. (Code 1950, § 58-238.6; 1978, c. 838; 1984, c. 675.)

Sec. 64.1-161 (1980).

A. Except as provided in subsection B of this section, whenever it appears upon any

settlement of accounts or in any other appropriate action or proceeding that an executor, administrator, curator, trustee or other person acting in a fiduciary capacity has paid an estate tax levied or assessed under the provisions of any estate tax law of the Commonwealth of Virginia or the United States heretofore or hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid shall be prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such apportionment shall be made in the proportion that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration each such person shall have the benefit of any exemptions, deductions and exclusions allowed by such law in respect of such person or the property passing to him; and except that notwithstanding the preceding provisions of this sentence in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest or estate in any property or fund, the tax on such

temporary interest or estate shall be charged against and paid out of the corpus of such property or fund without apportionment between temporary interests or estates and remainders thereafter.

B. The amount of tax paid on or with respect to property included in the decedent's gross estate under § 2044 of the Internal Revenue Code, as amended, or any successor provision (relating to certain property for which the marital deduction was previously allowed) shall be the excess of (i) the total estate tax levied or assessed under the provisions of the estate tax laws of the Commonwealth of Virginia and the United States over (ii) the estate tax that would have been levied or assessed under those provisions if the § 2044 property had not been included in the gross estate. The tax paid upon or with respect to the § 2044 property shall be prorated according to subsection A of this section as if no other estate tax were payable under the laws of the Commonwealth of Virginia and the United States and as if the § 2044 property constituted the entire gross estate; but it shall be prorated only among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit of such property accrues. The tax determined under (ii) above shall be prorated according to subsection A of this section as if no other estate tax were payable under the

laws of the Commonwealth of Virginia and the United States and as if the § 2044 property were not included in the gross estate. This subsection shall apply only to estates of persons dying on or after July 1, 1986. (Code 1950, § 64-151; 1952, c. 294; 1954, c. 664; 1968, c. 656; 1979, c. 559; 1986, c. 399.)

Sec. 64.1-162.
In all cases in which any property required to be included in the gross estate does not come into the possession of the executor, administrator or other fiduciary as such, he shall be entitled, and it shall be his duty to recover from whomsoever is in possession, or from the persons interested in the estate, the amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this article. (Code 1950, § 64-152; 1968, c. 656; 1986, c. 399.)

Annotated Code of Maryland:

Art. 62A, § 2 (1957).
In addition to the tax and/or taxes imposed by Article 81, a "Maryland estate tax" is hereby imposed upon the transfer of the "Maryland estate" of every "decedent," the amount of which "Maryland estate tax" shall be equal to the extent, if any, of the excess of the "credit" over the aggregate of "State taxes" paid by or out of the

"Maryland estate" of the "decedent" or any part thereof, provided, however, that such "Maryland estate tax" hereby imposed shall in no case exceed the extent to which its timely payment in accordance with federal law would effect a saving or diminution in the amount of the "federal estate tax" payable by or out of the "Maryland estate" of the "decedent" had this article not been enacted and provided further that "State taxes" will be considered "paid" only when and as payment or payments thereof have been made and received by the appropriate agency or official of the State of Maryland. The amount of the Maryland estate tax payable under this section is not altered, diminished, or affected in any way by the failure of an estate's representative to properly take and preserve the maximum State death tax credit allowable under federal law. (An. Code, 1951, § 2; 1939, § 1; 1929, ch. 275, § 2; 1965, ch. 794; 1975, ch. 56, § 1; 1978, ch. 109.)

Art. 81, § 151 (1957).
The taxes imposed by §§ 149 and 150 of this subtitle apply to all tangible or intangible property, real or personal, passing either by will or under the intestate laws of this State, or by deed, gift, grant, bargain or sale, made in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of a decedent, including property in

which the decedent, prior to his death, had an interest as joint tenant or tenant in common, and including property over which the decedent retained any dominion during his lifetime. * * *

§ 11-109 (1974).

(a) Definitions.--When used in this section

(1) "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax and the Maryland estate tax. * * * * * * *

(4) "Person interested in the estate" means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by reason of the death of a decedent, any property or interest therein included in the decedent's taxable estate. * *

(6) "Tax" means the federal estate tax and the Maryland estate tax and interest and penalties imposed in addition to the tax.

(b) Persons among whom tax to be apportioned. -- The tax shall be apportioned among all persons interested in the estate. The apportionment shall be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose.*

Internal Revenue Code:

Sec. 2011.
(a) In General.--The tax imposed by section 2001 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). * * * * *

Sec. 2044.
(a) General Rule.--The value of the gross estate shall include the value of any property to which this section applies in which the decedent had a qualifying income interest for life.
(b) Property to Which This Section Applies.--This section applies to any property if--
(1) a deduction was allowed with respect to the transfer of such property to the decedent--
(A) under section 2056 by reason of subsection (b)(7) thereof, or
(B) under section 2523 by reason of subsection (f) thereof, and
(2) section 2519 (relating to dispositions of certain life estates) did not apply with respect to a disposition by the decedent of part or all of such property.
(c) Property Treated as Having Passed From Decedent.--For purposes

of this chapter and chapter 13, property includible in the gross estate of the decedent under subsection (a) shall be treated as property passing from the decedent.
* * * * * * * *

Sec. 2056.
(a) Allowance of Marital Deduction.--For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.
(b) Limitation in the Case of Life Estate or Other Terminable Interest.--
(1) General rule.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest--
(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such

spouse); and * * * * *

(7) Election with respect to life estate for surviving spouse.--

(A) In general.--In the case of qualified terminable interest property--

(i) for purposes of subsection (a), such property shall be treated as passing to the surviving spouse and

(ii) for purposes of paragraph (1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

(B) Qualified terminable income interest property defined.--For purposes of this paragraph--

(i) In general.--The term "qualified terminable interest property" means property--

(I) which passes from the decedent,

(II) in which the surviving spouse has a qualifying income interest for life, and

(III) to which an election under this paragraph applies.

(ii) Qualifying income interest for life.--The surviving spouse has a qualifying income interest for life if--

(I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property and

(II) no person has a power to appoint any part of the property to any person other than the

surviving spouse.
Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse. To the extent provided in regulations, an annuity shall be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified).

(iii) Property includes interest therein.--The term "property" includes an interest in property.

(iv) Specific portion treated as separate property.--A specific portion of property shall be treated as separate property.

(v) Election.--An election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable. * * * * *

Sec. 2207A. * * * * *
* (1) In general.--If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which--

(A) the total tax under this chapter which has been paid, exceeds

(B) the total tax under this chapter which would have been payable if the value of such property had not been included in the gross estate. * * * *

Sec. 2523. * * * * *
(b) Life Estate or Other Terminable Interest.--Where, on the lapse of time, on the occurrence of an event or contingency or on the failure of an event or contingency to occur, such interest transferred to the spouse will terminate or fail, no deduction shall be allowed with respect to such interest--

(1) if the donor retains in himself, or transfers or has transferred (for less than an adequate and full consideration in money or money's worth) to any person other than such donee spouse (or the estate of such spouse), an interest in such property, and if by reason of such retention or transfer the donor (or his heirs or assigns) or such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination of failure of the interest transferred to the donee spouse; or * * * * *
(f) Election With Respect to Life Estate for Donee Spouse.--

(1) In general.--In the case of qualified terminable interest property--

(A) for purposes of subsection (a), such property shall be treated as transferred to the donee spouse, and

(B) for purposes of subsection (b)(1), no part of such property shall be considered as retained in the donor or transferred to any person other than the donee spouse.

(2) Qualified terminable interest property.--For purposes of this subsection, the term "qualified terminable interest property" means any property--

(A) which is transferred by the donor spouse,

(B) in which the donee spouse has a qualifying income interest for life, and

(C) to which an election under this subsection applies.

(3) Certain rules made applicable.--For purposes of this subsection, rules similar to the rules of clauses (ii), (iii), and (iv) of section 2056(b)(7)(B) shall apply.

(4) Election.--

(A) Time and manner.--An election under this subsection with respect to any property shall be made on or before the date prescribed by section 6075(b) for filing a gift tax return with respect to the transfer (determined without regard to section 6019(2)) and shall be made in such manner as the Secretary shall by regulations prescribe.

(B) Election irrevocable.--An election under this subsection, once made, shall be irrevocable.

(5) Treatment of interest retained by donor spouse.--

(A) In general.--In the case of

any qualified terminable interest property--

(i) such property shall not be includible in the gross estate of the donor spouse, and

(ii) any subsequent transfer by the donor spouse of an interest in such property shall not be treated as a transfer for purposes of this chapter.

(B) Subparagraph (a) not to apply after transfer by donee spouse.--Subparagraph (A) shall not apply with respect to any property after the donee spouse is treated as having transferred such property under section 2519, or such property is includible in the donee spouse's gross estate under section 2044. *

Supreme Court, U.S.
FILED
OCT 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-441

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**MARY SCOTT BLAKE BIRDSALL, MAGRUDER DENT, JR., and ROBERT PLAYFORD BOYLE, Executors of the Estate of Evernghim Blake,**

*Appellants,*

*v.*

**THOMAS R. SHEPHERD, JR. and R.J. CONNORS, Executors of the Estate of Kathleen Ann Kelley Blake and Trustees of the Kathleen Ann Kelley Blake Living Trust, and Personally, KATHLEEN SHEPHERD MACMILLAN, CHRISTOPHER H. SHEPHERD, MICHAEL K. SHEPHERD, MARY SHEPHERD COLEMAN, and ANN SHEPHERD LUGAR,**

*Appellees.*

**ON APPEAL FROM THE SUPREME COURT OF VIRGINIA**

## MOTION TO DISMISS

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## QUESTION PRESENTED

Is a substantial federal question present in the contention of appellants that the Supremacy Clause and the Due Process Clause compel apportionment of state estate taxes among beneficiaries of a taxable estate in a manner described in a federal statute when the federal statute addresses only federal estate taxes?

## TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... iii
OPINIONS BELOW ..... 2
JURISDICTION ..... 2
STATEMENT OF THE CASE ..... 2
ARGUMENT
I. Appellants have not established any substantial basis for their constitutional claims and have not raised any substantial federal questions ..... 5
A. The Supremacy Clause does not compel apportionment of state estate taxes in a manner identical to federal estate taxes ..... 5
B. A pro rata apportionment of state estate taxes is not an unconstitutional taking of property without due process of law ..... 9
II. An appeal does not lie from the refusal of a petition for appeal by the Supreme Court of Virginia ..... 10
CONCLUSION ..... 11
APPENDIX ..... 1a

## TABLE OF AUTHORITIES

**CASES** **PAGES**


*American Railway Express Co. v. Levee*, 263 U.S. 19 (1923) ..... 11

*Free v. Bland*, 369 U.S. 663 (1962) ..... 7

*Frick v. Pennsylvania*, 268 U.S. 473 (1925) ..... 8

*Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) ..... 6,7

*Mazza v. Mazza*, 475 F.2d 385 (D.C.Cir. 1973) ..... 6

*Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954) ..... 11

*Riggs v. Del Drago*, 317 U.S. 95 (1943) ..... 6

*Shepheard v. Godwin*, 280 F.Supp. 869 (E.D.Va. 1968) ..... 7

*Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) ..... 9

*United States v. Yazell*, 382 U.S. 341 (1966) ..... 7

*Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1871) ..... 7


**STATUTES**


28 U.S.C. 1257 ..... 11

Internal Revenue Code, Chapter 13 ..... 8

Internal Revenue Code, §2206 ..... 9

Internal Revenue Code, §2207A ..... 4,5,6,7

Internal Revenue Code, §2032A ..... 8

Internal Revenue Code, §2044 ..... 3,5

Internal Revenue Code, §2056(b)(7) ..... 3

Maryland Estates and Trust Code, §11-109 ..... 4

Code of Virginia, §64.1-161 ..... 4,6,8,9

Code of Virginia, §64.1-161A ..... 4

Code of Virginia, §64.1-162 ..... 4

Code of Virginia, §58.1-931, et seq ..... 8

Code of Virginia, §58.1-935, et seq ..... 8

**BOOKS**

71 Am. Jur.2d *State and Local Taxation* §§82, 83, 103 (1973) ..... 8

**NO. 87-441**

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**MARY SCOTT BLAKE BIRDSALL, MAGRUDER DENT, JR., and ROBERT PLAYFORD BOYLE, Executors of the Estate of Evernghim Blake,**

*Appellants,*

*v.*

**THOMAS R. SHEPHERD, JR. and R.J. CONNORS, Executors of the Estate of Kathleen Ann Kelley Blake and Trustees of the Kathleen Ann Kelley Blake Living Trust, and Personally, KATHLEEN SHEPHERD MACMILLAN, CHRISTOPHER H. SHEPHERD, MICHAEL K. SHEPHERD, MARY SHEPHERD COLEMAN, and ANN SHEPHERD LUGAR,**

*Appellees.*

**ON APPEAL FROM THE SUPREME COURT OF VIRGINIA**

## MOTION TO DISMISS

Pursuant to Rule 16, the appellees move the Court to dismiss the appeal herein on the grounds that the appeal is not within the jurisdiction of this Court because the appeal presents no substantial federal question and because the appeal is taken from the Supreme Court of Virginia which did not decide the merits of the case.

## OPINIONS BELOW

The letter opinion of the Circuit Court of Albemarle County, Virginia, reproduced in the Appendix of the Appellants' Jurisdictional Statement at page 2a, omits an important phrase. The first sentence on page 3a should read "I am further of the opinion that there is no constitutional infirmity in the apportionment of the Virginia tax on a pro rata basis between those who receive the assets that were included in Mr. Blake's taxable estate." The entire opinion is attached hereto at Appendix, page 1a.

## JURISDICTION

Appellees disagree with certain facts in the appellants' statement of jurisdiction.

The appellants incorrectly state that the Supreme Court of Virginia affirmed the final Order of the Circuit Court of Albemarle County, Virginia.[1] In fact, the Supreme Court of Virginia did not affirm the decision of the lower court but refused the appellants' petition for appeal.[2]

## STATEMENT OF THE CASE

The factual background as presented by appellants throughout appellants' Jurisdictional Statement calls for correction and augmentation.

This case involves a controversy between the executors of Evernghim Blake's estate, on the one hand, and certain beneficiaries of Evernghim Blake's taxable estate, on the other, over the amount that should be contributed by those beneficiaries toward state, not federal, estate taxes.

Kathleen Ann Kelley Blake ("Mrs. Blake") died on November 19, 1983. Evernghim Blake ("Mr. Blake"), husband of Mrs. Blake, died on June 20, 1984. Both died as residents of Virginia. Under Mrs. Blake's will, codicils and trust agreement, Mr. Blake or his estate were paid $2,000,000 outright and the net income from a trust ("the trust")

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[1] Appellants' Jurisdictional Statement, p. 5.

[2] Appellants' Jurisdictional Statement, Appendix, p. 1a.

established by Mrs. Blake.

A portion of the trust (Qualified Terminable Interest Property ["Q-TIP"]) was included in Mr. Blake's estate.[3] The same assets were included in Mrs. Blake's estate but qualified for the marital deduction.[4]

Mr. Blake's three children by his prior marriage and Mrs. Blake's six children by her prior marriage, the latter being the appellees, are all beneficiaries with respect to Mr. Blake's taxable estate. None of the assets comprising the Q-TIP trust were located in Maryland although Mr. Blake did own a farm in Maryland.

Both Virginia and Maryland have their own respective estate tax returns which differ from each other and which differ from the federal estate tax return although both state returns call for various figures from the federal estate tax return. Each state makes various adjustments to the figures from the federal return.

Contrary to appellants' statement[5], neither Virginia nor Maryland estate taxes are equal to a graduated percentage of the federal estate tax in any direct fashion. Both Maryland and Virginia estate taxes are related to the federal credit for state death taxes which is, in turn, related to the taxable estate, not taxes, with certain adjustments.

Maryland makes no claim for taxes on any trust assets because none of the trust assets were located in Maryland. Mr. Blake was not a resident of Maryland and Maryland estate tax applies only to property located in Maryland when the decedent is a non-resident.

Appellants suggest[6] that appellees have avoided paying a tax but have claimed a credit based upon the payment. Any credits would have been claimed on Mr. Blake's estate tax return. Appellees had nothing to do with Mr. Blake's estate tax return other than providing certain information to counsel for Mr. Blake's executors concerning values of trust assets. No evidence was offered to prove that Mrs. Blake's executors, or any of the appellees, have claimed any credit to

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[3] Pursuant to Internal Revenue Code §2044, the value of the portion of the trust included in Mr. Blake's estate on the regular estate valuation date was $11,310,502. The value of the portion of the trust included in Mr. Blake's estate on the alternate valuation date selected by Mr. Blake's executors, appellants, was $11,805,791, a higher value.

[4] Pursuant to Internal Revenue Code §2056(b)(7).

[5] Appellants' Jurisdictional Statement, p. 11.

[6] Appellants' Jurisdictional Statement, p. 25.

which they were not entitled.

Internal Revenue Code ("IRC") §2207A provides for the recovery of federal estate taxes[7] calculated on an incremental basis by the decedent's estate from the person or persons receiving Q-TIP property included in the decedent's estate. Virginia Code §64.1-161[8] apportions estate taxes generally on a pro rata basis instead of an incremental basis. Maryland has a statute similar to Virginia's.[9] Appellees, the persons ultimately recieving the Q-TIP property, have contributed an incremental amount of federal estate taxes as required by IRC §2207A. Appellees have contributed a pro rata amount of Virginia taxes as required by Virginia Code §64.1-161. Appellees made no contribution to Maryland estate taxes because none of the property received by appellees was subject to Maryland tax. Furthermore, Mr. Blake's will provision specifying the source of estate tax payments governed with regard to Maryland taxes and did not require payment by appellees.

Appellants state[10] that Mrs. Blake's executors reimbursed Mr. Blake's estate for a proportionate amount of Virginia estate taxes; the proportionate contribution in the amount of $1,337,395 was actually made by the trustees of Mrs. Blake's trust on behalf of the beneficiaries of the trust, the appellees.

The Circuit Court of the County of Albemarle, Virginia, by letter opinion dated 12 May 1986 incorporated in a final Order dated 12 June 1986 determined that appellees contributed all that was required by the Virginia statutes, and that appellees were not obligated to contribute toward Maryland taxes. The Circuit Court in reaching its decision construed the Virginia and Maryland statutes, and also found that appellants' constitutional claims were without merit. The Supreme Court of Virginia on the 16th day of June 1987 refused the appellants' petition for appeal.

Appellants contend that the Supremacy Clause requires

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[7] Internal Revenue code §2207A contains the phrase when it describes the recovery "tax under this chapter." The chapter referred to is the chapter of Internal Revenue Code assessing federal estate taxes.

[8] §64.1-161A after the 1986 amendment. Virginia Code §64.1-162 empowers the fiduciary of an estate to recover taxes apportioned under §64.1-161.

[9] Maryland Estates and Trusts Code, §11-109.

[10] Appellants' Jurisdictional Statement, p. 12.

apportionment of state estate taxes in a manner required by IRC §2207A with regard to federal estate taxes, and that pro rata apportionment as determined to be correct by the lower court results in a taking of property without due process of law in violation of the Fourteenth Amendment.

## ARGUMENT

### I. Appellants have not established any substantial basis for their constitutional claims and have not raised any substantial federal questions.

#### A. The Supremacy Clause does not compel apportionment of state estate taxes in a manner identical to federal estate taxes.

Without speculating about whether Congress could have addressed *state* taxes in IRC §2207A, it is clear from the wording of §2207A[11] that Congress did not address state taxes but

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[11] [Sec. 2207A]
SEC. 2207A. RIGHT OF RECOVERY IN THE CASE OF CERTIAN MARITAL DEDUCTION PROPERTY.

[Sec. 2207A(a)]
(a) RECOVERY WITH RESPECT TO ESTATE TAX.—

(1) IN GENERAL.—If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which—

(A) the total tax under this chapter which has been paid, exceeds

(B) the total tax under this chapter which would have been payable if the value of such property had not been included in the gross estate.

(2) DECEDENT MAY OTHERWISE DIRECT BY WILL.—Paragraph (1) shall not apply if the decedent otherwise directs by will.

[Sec. 2207A(b)]

(b) RECOVERY WITH RESPECT TO GIFT TAX.--If for any calendar year tax is paid under chapter 12 with respect to any person by reason of property treated as transferred by such person under section 2519, such person shall be entitled to recover from the person receiving the property the amount by which—

(1) the total tax for such year under chapter 12, exceeds

(2) the total tax which would have been payable under such chapter for such year if the value of such property had not been taken into account for purposes of chapter 12.

(continued)

addressed only federal taxes. Neither the wording of IRC §2207A nor its legislative history contain any indication of Congressional intent to preempt state apportionment provisions with respect to Q-TIP related *state* taxes.[12] Section 2207A refers to taxes imposed by the Internal Revenue Code, expressly Chapter Eleven of the Internal Revenue Code, that is, to federal taxes. No actual conflict exists between compliance with IRC §2207A for federal taxes, as was done in this case, and the proportional concept of Virginia's Section 64.1-161 as it applies to Virginia taxes. Section 64.1-161 of the Code of Virginia as applied in this case does not stand as an obstacle to the accomplishment and execution of the purpose and objective of Congress in enacting §2207A to govern the allocation of Q-TIP related *federal* estate taxes.

Contrary to what appellants suggest by citing cases in non-estate tax contexts, this Court, in *Riggs v. Del Drago,* held that even the apportionment of *federal* estate tax amongst those beneficially interested in the taxable estate, in the absence of a federal law to the contrary, is determined by state law. 317 U.S. 95, 110 (1942). Similarly, in *Mazza v. Mazza,* a U.S. District Court found that state law determined the impact of federal estate tax on those receiving property. 475 F.2d 385, 387 (D.C. Cir 1973). Except in instances where Congress has expressly provided for the apportionment of the federal estate tax, state law, rather than federal law, is determinative of the apportionment of federal taxes. *Id.*

*Hisquierdo v. Hisquierdo,* cited by appellants, deals with U.S.

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(continued from previous page)

[Sec. 2207A(c)]

(c) MORE THAN ONE RECIPIENT OF PROPERTY.—For purposes of this section, if there is more than on person receiving the property, the right of recovery shall be against each such person.

[Sec. 2207A(d)]

(d) TAXES AND INTEREST.—In the case of penalties and interest attributable to additional taxes described in subsections (a) and (b), rules similar to subsections (a), (b), and (c) shall apply.

[12] Virginia's apportionment statute was in existence when IRC §2207A was enacted. Numerous other states have statutes similar to Virginia's requiring apportionment of state estate taxes on a proportional basis. Appellant's Jurisdictional Statement, p. 23.

Railroad Retirement Act benefits and the question of whether claims may be asserted to those benefits under the guise of community property schemes which would divert benefits from the retired employees when the federal statute provided that such benefits were not to be diverted by "legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated..." 439 U.S. 572, 805 (1979). There is no analogy to the circumstances at hand. IRC §2207A contains no similar provision which even by implication might preempt state apportionment schemes. Interestingly, *United States v. Yazell,* 382 U.S. 341 (1966), cited by appellants, held that federal interests in the context of the Small Business Administration loan collection procedures did not require preemption of state rules. *Free v. Bland,* 369 U.S. 663(1962), relied upon by appellants, dealt with the Treasury Regulations under which U.S. savings bonds were issued explicitly providing that such bonds, when registered in a certain fashion, pass by right of survivorship. Federal law was clear and therefore the survivorship feature was upheld against an interest claimed under Texas community property laws. Federal law in the context now before the Court is also clear. The federal law applies to federal taxes, and appellees have contributed federal taxes consistent with federal law. The federal law does not apply to state taxes. States are not even required by Congress to have marital deduction laws much less required by Congress to apportion related taxes in a certain fashion.

Appellants also cite *Shepheard v. Godwin,* but without offering any explanation concerning the application of this case to the facts at hand. 280 F.Supp. 869 (E.D.Va. 1968).

Appellant's assertion that the Supremacy Clause requires Virginia and Maryland estate taxes to conform to the federal scheme in IRC §2207A contradicts the long-standing position of this Court that a state's power to tax is separate and distinct from the federal government's power to tax, and the federal government's power to tax in no way curtails a state's power to tax. In *Ward v. Maryland,* this Court held that the power to tax for state purposes is as much an exclusive power in the states as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress. 79 U.S. (12 Wall.) 418, 420 (1871).

Although the taxation powers possessed by the states and the federal governments are subject to certain prohibitions and restrictions, in all other respects they are supreme powers possessed by each government entirely independent of the other. *Id.*

In a case dealing with the compatibility of federal and state statutory estate tax schemes, this Court held that even though both statutory schemes are laid on the same subject, neither has priority over the other. *Frick v. Pennsylvania,* 268 U.S. 473, 499 (1925). The Court went on the say that, subject to certain exceptions, the power of taxation granted the federal government does not curtail or interfere with the taxing power of the several states. *Id.* This power in the two governments is generally so far concurrent as to render it admissible for both, each under its own laws and for its own purposes, to tax the same subject at the same time. *Id.*

Thus, it has been settled that the power of taxation exists in the states to the full extent to which it may be exercised by any sovereign nation. A state's power of taxation is, where the subjects to which it applies are within the jurisdiction of the state, unlimited, plenary, absolute, and supreme. *See generally* 71 Am. Jur. 2d *State and Local Taxation* §§82, 83 & 103 (1973).

Although Virginia and Maryland may make reference to the federal estate tax return for certain numbers and to the federal estate tax laws for certain definitions, there are many instances where so-called "conforming" legislation has either not been enacted or been delayed. Both the special use valuation contained in IRC §2032A and the generation skipping tax contained in IRC Chapter 13 were enacted at the federal level in 1976. Virginia did not enact special use legislation until 1981[13] and did not enact a generation skipping tax until 1979.[14] Thus, the states are free to pick and choose in terms of conformity and the timing of conformity and that is what Virginia has done with regard to §64.1-161. The frequency with which federal laws have changed in the past few years make it impossible for state legislatures to conform, even if they should desire to do so, in lock step. In the

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[13] Virginia Code §58.1-931 et seq, Code of Virginia 1950, as amended.

[14] Virginia Code §58.1-935 et seq, Code of Virginia 1950, as amended.

past eleven years there have been five major changes in the federal estate tax laws: the Tax Reform Act of 1976, the Economic Recovery Tax Act of 1981, the Tax Equity and Fiscal Responsibility Act of 1982, the Tax Reform Act of 1984 (as a part of the Deficit Reduction Act of 1984), and the 1986 Tax Reform Act. Each of the foregoing federal tax acts made significant changes in federal estate taxation. It is impossible for the states to consider and make adjustments in their respective systems in order to conform immediately to federal tax legislation. Congress has not attempted to impose conformity, and the Supremacy Clause has no bearing in this case.

**B. A pro rata apportionment of state estate taxes is not an unconstitutional taking of property without due process of law.**

Appellants also argue that the proportional application of Virginia Code §64.1-161 creates an unconstitutional taking of property without due process of law. Appellants do not cite any estate tax apportionment cases. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), cited by appellants, deals with sweet gas production and sales quotas promulgated in Texas. Appellants offer no explanation concerning the applicability of that case to the facts at hand.

In fact, the U.S. Congress in IRC §2206 enacted a pro rata apportionment statute which is still in existence today. IRC §2206 deals with the liability of life insurance beneficiaries for estate tax and states "the executors shall be entitled to recover from such beneficiaries such portion of the total tax paid as the proceeds of such policies bear to the taxable estate...." Thus, even at the federal level, there is a pro rata apportionment scheme similar to the Virginia statute for certain assets. Appellants suggest[15] that the only way to avoid constitutional infirmity is for the appellees to pay 100% of the tax related to the Q-TIP property and for Mr. Blake's children to pay 100% of the tax related to the non-Q-TIP property. The problem with this position is that it does not take into consideration the progressive rates.[16] Virginia's

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[15] Appellants' Jurisdictional Statement, p. 14.

[16] The impossibility of this "two estate" analysis suggested by appellants (See Jurisdictional Statement, p. 24) can be proved through the following example. T
(continued)

apportionment statute simply apportions the progressive rates pro rata, and that does not result in a taking of another's property. No case has been cited which even remotely suggests that it does result in a taking of property that violates due process.

Maryland taxes are imposed only with regard to Maryland property and none of the trust property passing to appellees is Maryland property. Not only does the tax source clause in Mr. Blake's will govern the payment of Maryland taxes, Maryland apportionment statutes do not allocate taxes to appellees. Any recipient of an asset subject to taxes in a non-domiciliary jurisdiction might pay higher taxes by virtue of assets located in the state of domicile because the total taxes may be higher. Appellees who are the remaindermen of the trust have been forced to pay higher Virginia taxes by virtue of Mr. Blake's non-Q-TIP assets just as appellants have been forced to pay higher Virginia taxes by virtue of the Q-TIP assets. Apportionment by its very nature works in this fashion and has a long history of application in many contexts. It is simply a matter of sharing in the progressive rates which is the theory underlying all apportionment statutes. The sharing of progressive rates in a proportionate fashion does not result in the taking of property without due process, and no federal question has been raised by appellants in this regard.

**II. An appeal does not lie from the refusal of a petition for appeal by the Supreme Court of Virginia.**

Appellants, by their Notice of Appeal, seek to invoke appeal to this Court from the Supreme Court of Virginia. That court did not decide the merits but merely refused appellants' petition for

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has an estate, including trust interests, for tax purposes of $3,000,000; $2,000,000 goes to his sisters and $1,000,000 to his brothers. The total Virginia estate taxes on the $3,000,000, assuming all property to be in Virginia, is $182,000. However, if the taxes are calculated separately as if there were two estates involved, as appellants suggest, the tax on the $2,000,000 flowing to T's sisters is $99,600 and the taxes calculated separately on the $1,000,000 flowing to T's brothers is $33,200. The combination of the separate taxes is $132,800. However, the total taxes under Virginia law are $182,000. The difference of $49,200 ($182,000 minus $132,800) is a failure to consider the impact of the progressive rates, and discloses the conceptual error in the two estate notion advanced by appellants.

appeal. Therefore, technically, there is no jurisdiction under 28 U.S.C. 1257. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 160 (1954); *American Railway Express Co. v. Levee,* 263 U.S. 19, 20-21 (1923).

## CONCLUSION

Wherefore, appellees respectfully submit that the appeal should be dismissed for failure to present a substantial federal question and because the appeal was brought from the wrong court.

Respectfully submitted,

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## APPENDIX

*Birdsall, et al. v. Shepherd, et al.*
Chancery 5368-C
Albemarle County Circuit Court
(Letter Opinion dated 12 May 1986)

The primary dispute involved in this proceeding is whether the increased Virginia state tax liability of the Evernghim Blake estate, attributable to the inclusion of "Q-TIP" trusts assets in his taxable estate is to be allocated incrementally or porportionately on a pro rata basis. I conclude that Virginia Code §64.1-161, as applied to estates of individuals dying prior to July 1, 1986, requires that the tax be apportioned on a pro rata basis. The General Assembly of Virginia during its 1986 session gave recognition of no other interpretation of said statute when it made provision for incremental allocation of Virginia's tax attributable to "Q-TIP" trust assets that are included in the taxable estate of a person dying on or after July 1, 1986. I am further of the opinion that there is no constitutional infirmity in the apportionment of the Virginia tax on a pro rata basis between those who receive the assets that were included in Mr. Blake's taxable estate.

As for the Maryland tax liability, Mr. Blake's will in its paragraph FOURTH directs the payment of that tax. The asset located in Maryland was solely owned by Mr. Blake at the time of his death.

In summary, the defendants are not liable to the Evernghim Blake estate for any more of the Virginia estate taxes assessed against Mr. Blake's estate than they have already paid. They have no liability as to the Maryland tax.

As for defendants' request that representatives of Mrs. Blake's beneficiaries be permitted to participate in any audit procedures concerning the value of "Q-TIP" related assets, such request more appropriately is to be addressed to those tax officials who may conduct an audit.

Finally, the presence of the Commonwealth of Virginia was not necessary to the adjudication of the issues presented in this action. Its motion to drop its Tax Commissioner William Forst as a party defendant is granted.

Mr. Perkins will draft an order relative to the rulings herein made and will submit it to counsel for endorsement.